



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB DOCKET NO. 13-147; FCC 12-79]

Allegations of Anticompetitive Behavior in Satellite Industry

AGENCY: Federal Communications Commission.

ACTION: Notice of Inquiry.

SUMMARY: The Federal Communications Commission (Commission) seeks comment on whether, and, if so, to what extent, incumbent satellite operators are inhibiting competition in the market for satellite services, particularly in the fixed-satellite services (FSS) arena. Specifically, the Commission seeks comment on whether FSS operators are warehousing satellite orbital locations and frequency assignments, and preventing competitors from purchasing capacity on incumbent-owned satellites.

DATE: Comments are due on or before [Insert date 30 days after publication in the Federal Register], and reply comments are due on or before [Insert date 60 days after publication in the Federal Register]

ADDRESSES: You may submit comments, identified by IB Docket No. 13-147, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Federal Communications Commission's Web Site: <http://www.fcc.gov/cgb/ecfs>.

Follow the instructions for submitting comments.

- People with Disabilities: Contact the FCC by e-mail to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.): FCC504@fcc.gov; or phone 202-418-0530; or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, *see* the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Alan Thomas (202) 418-2338, Satellite Division, International Bureau, Federal Communications Commission, Washington, DC 20554. For additional information concerning the information collection(s) contained in this document, contact Judith B. Herman at 202-418-0214, or via the Internet at Judith-B.Herman@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Inquiry (Notice) in IB Docket No. 13-147, adopted June 5, 2013, and released on June 7, 2013. The full text of the Notice is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 202-488-5300, facsimile 202-488-5563, or via e-mail FCC@BCPIWEB.com.

INITIAL PAPERWORK REDUCTION ACT OF 1995 ANALYSIS: This document does not propose revised information collection requirements.

I. SUMMARY OF NOTICE OF INQUIRY

A. Background

In this Notice of Inquiry (Notice) the Commission seeks comment on whether, and, if so, to what extent, incumbent satellite operators are inhibiting competition in the market for satellite services, particularly in the fixed-satellite services arena. This Notice results from comments submitted in response to two Congressionally-mandated reports: the Orbit Act Report and the Satellite Competition Report.

Pursuant to the Open-Market Reorganization for the Betterment of International Telecommunications Act (Orbit Act)¹, the Commission is required to submit an annual report to Congress concerning the progress made with regard to the privatization of INTELSAT and Inmarsat. Some of the comments submitted in preparation of the Eleventh Orbit Act Report² raised two allegations of anticompetitive behavior: first, that Intelsat and other dominant satellite operators are warehousing scarce orbital resources, i.e., hoarding satellite orbital locations and frequency assignments by failing to replace aging satellites on a timely basis or otherwise failing to provide transponder capacity that reflects current technology. The second allegation is that Intelsat is now a vertically integrated company, i.e. able to provide its customers both space and ground communications services, that discriminates against competitors. As a vertically integrated company, Intelsat not only provides satellite services to integrators (resellers)

¹ Open-Market Reorganization for the Betterment of International Telecommunications Act, 47 U.S.C. §§ 701, 706(e) (2000).

² *FCC Report to Congress as Required by the ORBIT Act: Eleventh Report*, FCC 10-112, 25 FCC Rcd 7834, 7857-7861(2010)

who need satellite bandwidth to fashion their own customer-specific service offerings, but Intelsat also competes against integrators because Intelsat is now able to fashion its own customer-specific service offerings. Consequently, some integrators allege that this dual role has resulted in them being vertically foreclosed or barred by Intelsat from securing satellite bandwidth capacity.

The Commission noted that the Eleventh Orbit Act Report was not the appropriate forum in which to resolve such allegations, and stated that the allegations would be addressed in an appropriate forum.

The allegations were again raised in comments considered in the Third Satellite Competition Report,³ a report the Commission annually delivers to Congress regarding the state of competition in the satellite industry.⁴ In the Third Satellite Competition Report, one commenter expanded upon the warehousing and vertical foreclosure allegations it made in the Eleventh Orbit Act Report; the Commission, however, determined that it was unable to reach conclusions regarding these allegations for two reasons. First, the factual record for the Third Satellite Competition Report was limited with regard to the warehousing allegations and, second, the evidence was inconclusive whether Intelsat restricts or prevents integrators from obtaining satellite bandwidth capacity. The Third Satellite Competition Report concluded that these allegations

³ *Third Report and Analysis of Competitive Market Conditions with respect to Domestic and International Satellite Communications Services, Report and Analysis of Competitive Market Conditions with respect to Domestic and International Satellite Communications Services*, FCC 11-183, IB Docket Nos. 09-16 and IB 10-99, 26 FCC Rcd 17284, 17346-17353 (2011).

⁴ Amendment to Communications Satellite Act, Pub. L. No. 109-34, 119 Stat. 377 (2005), codified at 47 U.S.C. § 703.

warranted additional analysis in a separate proceeding where a more detailed record could be developed and explored.

B. Warehousing Allegations

a. Gaps In Service

In the Notice, the Commission identified four types of potential warehousing scenarios. In the first scenario, warehousing can result from gaps in service when an operator de-orbits or relocates an in-orbit satellite, but does not immediately place another satellite into the vacated orbital location. Whether such a gap is the result of warehousing or a legitimate exercise of operator flexibility is a determination the Commission makes on a case-by-case basis. In the Notice, the Commission asks, for example, whether it should adopt a rule that declares unused spectrum available for reassignment as soon as service is terminated, unless an operator can demonstrate that it terminated service because of an unforeseen catastrophic circumstance. Alternatively, the Commission asks whether permitting some gap in service would strike a better balance between providing an operator flexibility in managing its fleet while still safeguarding against warehousing.

Gaps in service often result in satellite operators inserting replacement satellites that do not operate on all the frequency bands used by the retired or relocated satellite; and while satellite operators sometimes specify the frequencies used by both incoming and outgoing satellites, often they do not, thus requiring that the Commission expend resources and time in order to sort out which frequencies are operational at a particular orbital location. Thus, the Commission asks, for example, whether each replacement application should include a table that lists the frequencies used by both the original and the replacement space station, and whether an application should be considered incomplete if it does not

include such a table. The Commission also seeks comment on how to expeditiously address situations where incomplete frequency information is provided.

Additionally, there are instances where a gap in service is caused by unforeseen circumstances. Under the Commission's current rules, requests for emergency replacement satellites are considered on a case-by-case basis and, generally, the Commission grants authority for emergency replacement satellites as long as an operator timely launches a new satellite or relocates an in-orbit satellite into the vacant orbital location. Where the failure of a fully functional five-year old in-orbit satellite would be viewed as a catastrophic failure that excuses a gap in service, the Commission asks, for example, whether the same should be true of a fourteen-year old satellite that fails a few months earlier than expected; relatedly, the Commission asks whether in a non-emergency situation, the satellite operator should have made significant progress on construction of and have concrete launch plans for a replacement satellite, particularly given that it takes two-to-five years to construct and launch a satellite. The Commission also asks, for example, whether it should require satellite operators to submit, in their annual reports, end-of-life projections for all in-orbit satellites, and asks for comment on whether it should propose rules that may allow it to expedite consideration of requests for emergency replacement satellites.

b. Older Replacement Satellites

In the second scenario, warehousing can arise when there is no gap in service but a satellite operator decides to relocate an older, in-orbit satellite to serve as a replacement for a satellite it has de-orbited or moved to another location. These situations potentially

restrict transponder capacity and result in an underutilization of spectrum resources because newer technology is not brought into use at that orbital location. As with other potential warehousing situations, the Commission must evaluate these requests on a case-by-case basis; thus, the Commission seeks comment on, for example, the use of older satellites as replacement satellites and whether this practice restricts transponder capacity and results in an underutilization of spectrum resources. Additionally, the Commission requests comment on whether or to what extent allowing operators to use older satellites as replacements precludes the use of newer technologies that can provide improved services to consumers.⁵ For example, the Commission asks whether it should permit an operator to replace a 13- or 14- year old satellite with another satellite that is 13- or 14- years old, and whether it should be more concerned about the health of the replacement satellite, rather than its age.

c. License Extensions

With an increase in the useful life of satellites, the third potential warehousing scenario is evidenced by the increase in the number of requests made of the Commission to extend a satellite's license term well beyond its initial license term. While it may be possible for a satellite to operate an additional decade or more beyond its original license term, the Commission asks whether lengthy extensions allow inefficient or partially-functioning

⁵ Most satellite operators are required to submit annual reports to the Commission detailing the status of their space stations. Depending on the service, the operator may have to provide the status of satellite construction and expected launch dates, and a detailed description of the utilization of in-orbit satellites, including outages, and any transponders not available for service. See 47 C.F.R. §§ 25.142 (c), 25.143 (e), 25.145 (f) (1), 25.146 (l), and 25.210 (l). The Commission has proposed to consolidate these reporting requirements into a single rule. See *Comprehensive Review of Licensing and Operating Rules for Satellite Services*, FCC 12-117, Notice of Proposed Rulemaking, 27 FCC Rcd 11619 (2012). *Comprehensive Review of Licensing and Operating Rules for Satellite Services*, Proposed Rules, 77 Fed. Reg. 67172 (Nov. 8, 2012)

satellites to block customer access to newer, state-of-the art satellites. Additionally, the Commission asks whether, for example, prior to granting a license extension, it should require the operator to submit information regarding the satellite's health, and how it might apply license extension limitations to non-U.S. licensed satellites granted market access to the United States.

d. Underutilized Satellites

The fourth potential warehousing scenario concerns underutilized satellites. Regardless of age and for a variety of reasons, satellites may not be operating at full capacity. The Commission seeks comment on whether this creates a concern that the operator is warehousing spectrum, and asks whether it should propose a rule that automatically terminates a space station license if the percentage of unused capacity exceeds a certain amount. Even if the authorization for an underutilized satellite is not cancelled, the Commission asks whether, at a minimum, the unused spectrum should be made available for reassignment. Additionally, the Commission asks whether there are instances in which such "non-use" may be acceptable.

2. Vertical Foreclosure Allegations

Although some integrators allege that a vertically-integrated Intelsat has foreclosed them from securing satellite bandwidth capacity, the Commission's focus is on protecting competition rather than protecting particular competitors. Thus, loss of business and profits to integrator firms themselves is not considered a public interest harm if end users, i.e., customers and/or consumers, are not harmed.

a. Analytical Framework

In the Third Satellite Competition Report, the Commission described a multi-step framework for examining the vertical foreclosure allegations and determining whether end users are being harmed. The framework, for example, seeks to determine: (1) whether the alleged foreclosure conduct has or might lessen competition by excluding integrators from acquiring bandwidth capacity, and whether integrators have access to adequate alternatives to satellite bandwidth; (2) whether Intelsat has the ability to compete effectively as a provider of satellite services as well the ability to foreclose competitors; (3) whether Intelsat's vertical integration creates procompetitive cost savings and efficiencies likely to be passed on to end users; or, instead, is likely to result in increased price or degraded service quality; (4) whether any resulting efficiencies from vertical integration are likely passed on to end users; and (5) whether the Commission must determine if vertically integrated satellite operators will, to their advantage and to the detriment of integrators, purchase bandwidth from each other, and whether that relationship might have an impact on competition.

b. Issues for Inquiry

In addition to seeking comment on the multi-step framework, the Commission seeks additional information that can help it evaluate adequately the warehousing and vertical foreclosure allegations. For example, the Commission seeks more details on the nature and scope of the alleged foreclosure, asking that commenters detail the time period, the geographic routes involved, the amount and type of bandwidth capacity (Ku-band, C-band, etc.) involved, and the size of the disputed business, either in absolute terms or relative to the size of the excluded integrators' business, the FSS operators' business, or

the total demand of the affected customer(s). The Commission asks whether integrators, for example, have viable options other than using satellite bandwidth capacity, whether integrators can launch their own satellites, and how non-satellite bandwidth options compare to service provide by satellite operators.

The Commission asks commenters about various types of pricing information; information that will aid in measuring cost savings and efficiencies that, if any, result from vertical integration; data on why vertical integration does not reduce costs and create efficiencies; data that quantifies the effect of the vertical integration on the services provided to end users (including changes in the number of bidders, the features and quality of service provided by the selected bidder, and bid rates); data on whether Intelsat vertical integration was facilitated by horizontal collusion among satellite operators, and/or whether the vertical integration has enhanced or deterred coordinated interactions among potential bidders; and comment on appropriate remedies that could be implemented by the Commission.

II. REGULATORY IMPACT CONCLUSION

This Notice seeks data which will be used to assess the warehousing and vertical foreclosure allegations. It does not propose any changes to existing rules.

III. PROCEDURAL MATTERS

A. Ex Parte

The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s ex parte rules. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different

deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

B. Initial Regulatory Flexibility Act

This document does not propose any economic impact on small entities.

C. Initial Paperwork Reduction

This document does not propose new or modified information collection requirements, and does not propose to eliminate any existing information collection requirements.

D. Filing of Comments and Reply Comments

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. When filing comments or reply comments, please reference IB Docket No. 13-147. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together

with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail at: FCC504@fcc.gov; phone: 202-418-0530 or TTY: 202-418-0432.

IV. ORDERING CLAUSES

Accordingly, it is ordered that, pursuant to sections 1, 4 (i), 4 (j), 4 (o), 301, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154 (i)-(j) & (o), 301, and 403, section 1.430 of the Commission's Rules, 47 CFR § 1.430, this Notice of Inquiry in IB Docket No. 13-47 IS ADOPTED.

It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center shall send a copy of this Notice of Proposed Rulemaking, including the initial regulatory flexibility act analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, et seq. (1981).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,

Secretary.

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